In the High Court of Judicature at Madras

Dated 29.06.2006

Coram

The Honourable Mr.Justice S.R.SINGHARAVELU

Criminal Revision Case No.1479 of 2004
and Crl.M.P.No.9288 of 2004

Vinayagam ..Petitioner/Respondents

..vs..

1. Aruna
2. Minor Sangeetha
   rep.by her mother and natural
   guardian 1st respondent ..Respondents/Petitioner

Criminal Revision Petition filed under sections 397 and 401 of Criminal Procedure Code, against the judgment made in Cr.R.P.No.2 of 2003 dated 22.09.2003 by the Principal District and Sessions Judge, Vellore.

For Petitioner : Mrs.Hema Sampath
For Respondents : No appearance

ORDER

This criminal revision petition arises against the order dated 22.09.2003 made in Cr.R.P.No.2 of 2003 by the learned Principal District and Sessions Judge, Vellore, granting maintenance at the rate of Rs.1000/- and Rs.500/- per month to the respondents 1 and 2 respectively, which was rejected by the order dated 16.12.2002 in M.C.No.2 of 2002.

2. That was a petition preferred by the wife and minor daughter for their maintenance in M.C.No.2 of 2002, which was dismissed on 16.12.2002 by the learned Judicial Magistrate No.IV, Thirupattur, Vellore District.

3. That order was passed on the footing that despite there was an order of restitution of conjugal rights against the wife passed on 05.12.2002 by the learned Subordinate Judge, Cuddalore, in H.M.O.P.No.22 of 2002, the wife has not resumed the matrimonial home.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

4. The petitioner before us is the husband. He is aggrieved over the order dated 22.09.2003 of the learned Principal Sessions Judge, Vellore in reversing the order of learned Judicial Magistrate No.IV, Thirupattur.

5. After having gone through the records and the orders of the courts below, I find that the order of the learned Principal Sessions Judge, Vellore is to be upheld and that maintenance is to be awarded in favour of the wife and minor daughter. The reason for the same is that refusal of maintenance was made by learned Judicial Magistrate No.IV, Thirupattur only on the ground that the wife did not comply with the order of restitution of conjugal rights passed against her. True it is that it was a binding order to be effectuated by either party. But if there is intervening circumstance subsequent to the passing of that order making the wife not able to join in the matrimonial home, then the mere fact that there was an order of restitution of conjugal rights could not be an impediment for passing maintenance.

6. That intervening circumstance in this case is the admission made on the part of the husband during the proceedings of the maintenance that he had assaulted the wife. Even though the husband maintained in the proceedings upon his application of conjugal rights as if he never assaulted the wife, it is later on during the course of the proceedings of the maintenance, the husband admitted such of his assault made upon the wife. That was rightly grounded for award of maintenance by the lower appellate court. Not only that, there was an admission on the part of the husband culled out by the lower appellate court in para 7 of its judgment, but also there was a direction by the husband himself throwing the wife and her parents and the minor daughter out of the matrimonial home, which reads as follows:

> "R.W.1 in his evidence has stated that on 15.09.2001 when the second petitioner dashed against a chair, since she is one year old, she made weeping. At that time the revision petitioner entered into the room, the respondent was in that time but he has not taken care of the child for consolation. Immediately the first revision petitioner asked the revision petitioner why he is not taking care of the child to console her. At that time the respondent assaulted the first revision petitioner with remote. So she sustained injuries in the presence of her parents. So wordy altercation taken place between the respondent and the first revision petitioner and her parents. He directed the first revision petitioner and her parents to be away from the home immediately. They gone to the house owner's house, stayed there, since the occurrence taken place during night time, very next day they left the home".

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

7. That fact may be a trivial one so as to order restitution of conjugal rights, but in so far as it was instrumental for making the wife and minor daughter to leave the matrimonial home and that such act of their leaving home was only at the instance of the husband, the latter has to pay maintenance.

8. Mrs.Hema Sampath, learned counsel appearing for the husband relied upon the decision Geeta Kumari ..vs.. Shiva Charan reported in 1975 Crl.L.J.137, wherein it was held that in a decision against the wife for restitution of conjugal rights was equivalent to a decision by a competent Civil Court that the wife had no sufficient reason for refusing to live with her husband and the Criminal Court cannot enquire into any allegations of failure or neglect to maintain prior to such decision.

9. The above finding was based upon on an earlier decision in Mohd.Siddiq ..vs.. Zubeda Khatoon (AIR 1952 Allahabad 616), wherein it was observed that in a subsequent case for maintenance, the Criminal Court may not enquire into allegations of failure or neglect to maintain prior to the decree of restitution of conjugal rights. It was further observed as follows:

> "If the wife chooses for purposes of some advantage to herself not to live with her husband, she cannot say that it is the husband who has neglected her or refused to maintain her".

Therefore, it is a specific circumstance, wherein maintenance was denied subsequent to a decree of restitution of conjugal rights and that denial was on the ground that wife had chosen for purposes of some advantage to her not to live with her husband. That is not the fact before us.

10. Similar view was taken in Kaliyaperumal ..vs.. Lakshmi ((2003)1 MLJ 73). In that case, wife remained ex parte and restitution of conjugal rights was obtained by the husband; decree not executed but it was in force; subsequently, wife filed a suit for maintenance; suit decreed; the appeal was dismissed; the Second Appeal to the High Court was partly allowed and it was held that when there is a decree by the competent Court for restitution of conjugal rights, the wife cannot claim maintenance. Focus was made in that case as to the validity of the ex parte decree of restitution of conjugal rights. It was held in the circumstance that even though a decree was passed ex parte and even though it was not executed, it is still in force and therefore, when restitution of conjugal rights was ordered and when there was no sufficient reason for the wife to set aside the said ex parte order, there could be no right for her to claim maintenance. What is meant is that pending application preferred

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

by the wife to set aside the order of restitution of conjugal rights, she will be entitled to claim maintenance until it is dismissed. What is really meant is that if there are sufficient reasons shown at any stage in order to set aside the earlier order of restitution of conjugal rights and especially, basing upon certain admission made by the husband, then the mere decree of restitution may not estop the valid claim of maintenance otherwise established.

11. But here is a case, where we cannot simply rule out that because of the earlier decree of restitution of conjugal rights, the wife is estopped from claiming maintenance provided she has otherwise got sufficient grounds to set forth her claim of maintenance.

12. In other words, if the wife is unsuccessful in establishing in a case for restitution of conjugal rights about the assault made upon her and the fact of being knocked away from the matrimonial home, that does not mean that she is estopped from claiming maintenance subsequently based upon the admission made by the husband in the subsequent proceedings of the maintenance about the earlier assault.

13. To put it otherwise, the subsequent admission of the fact of assault by the husband during the course of maintenance proceedings may be a better ground for awarding maintenance, even though there was a decree for restitution of conjugal rights upon his own plea of ignorance and especially when the wife could not prove the assault upon her. When factual matrix makes a basis for maintenance, earlier decree of restitution of conjugal rights may not technically estop her; otherwise it will lead to miscarriage of justice.

14. For the aforesaid reasons, this criminal original petition is dismissed and the order of the lower appellate court is confirmed. No costs. Consequently, connected Crl.M.P.is closed. Due to the peculiar facts and circumstances of the case, there is no general proposition laid in this case and whatever said may apply to the present facts of the case.

gl

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

To

1. The Principal District & Sessions Judge,
   Vellore.

2. The Judicial Magistrate No.IV,
   Thirupattur.

+ 1 cc to M/s. Hema Sampath, Advocate SR No.27799/06

TM(CO)
SR/4.7.2006

Order in
Crl.R.C.No.1479 of 2004

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/